

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

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JOHN RAY VELLA.

Plaintiff,

V.

CAROLYN W. COLVIN.

**Defendant.**

Case No. 2:15-cv-01560-APG-GWF

## **ORDER ACCEPTING REPORT AND RECOMMENDATION AND REMANDING TO THE SOCIAL SECURITY ADMINISTRATION**

(ECF Nos. 12, 17, 18)

10 Magistrate Judge Foley issued a Report and Recommendation (ECF No. 19)  
11 recommending I grant plaintiff John Vella's motion to remand and deny defendant Carolyn  
12 Colvin's motion to affirm. Defendant objected to Judge Foley's Report and Recommendation.  
13 ECF No. 20.

I may reverse a denial of benefits “only if it is not supported by substantial evidence or is based on legal error.” *Robbins v. Soc. Sec. Admin.*, 466 F.3d 880, 882 (9th Cir. 2006). “Substantial evidence means more than a mere scintilla, but less than a preponderance; it is such relevant evidence as a reasonable person might accept as adequate to support a conclusion.” *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035 (9th Cir. 2007) (internal quotation marks omitted). “If the evidence can reasonably support either affirming or reversing a decision, [I] may not substitute [my] judgment for that of the Commissioner. *Id.* However, I “consider the entire record as a whole, weighing both the evidence that supports and the evidence that detracts from the Commissioner’s conclusion.” *Id.* (quotation omitted). I “may not affirm simply by isolating a specific quantum of supporting evidence.” *Id.* (quotation omitted).

24 The Social Security Administration “favors the opinion of a treating physician over non-  
25 treating physicians.” *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007) (citing 20 C.F.R.  
26 § 404.1527). “If a treating physician’s opinion is ‘well-supported by medically acceptable  
27 clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial

1 evidence in [the] case record, [it will be given] controlling weight.”” *Id.* (quoting 20 C.F.R.  
2 § 404.1527(c)(2)). If the ALJ does not give a treating physician’s opinion “controlling weight,”  
3 either because it is not well-supported or because it is inconsistent with other substantial evidence  
4 in the record, then the ALJ considers various factors to determine the weight to give that opinion,  
5 including the “[l]ength of the treatment relationship and the frequency of examination,” the  
6 “nature and extent of the treatment relationship,” the support for the opinion, the consistency  
7 between the opinion and the record as a whole, and any other relevant factors bearing on a  
8 particular case. *Id.* § 404.1527(c)(2)(i)-(ii) & (c)(3)-(6). Thus, even if not given controlling  
9 weight a treating physician’s opinions “are still entitled to deference and must be weighed using  
10 all of the factors provided in 20 C.F.R. 404.1527.” *Orn*, 495 F.3d at 631-32 (quoting Social  
11 Security Ruling 96-2p at 4 (Cum. Ed. 1996)).

12 “Even if the treating doctor’s opinion is contradicted by another doctor, the ALJ may not  
13 reject this opinion without providing specific and legitimate reasons supported by substantial  
14 evidence in the record.” *Id.* at 632 (quotation omitted). “This can be done by setting out a  
15 detailed and thorough summary of the facts and conflicting clinical evidence, stating his  
16 interpretation thereof, and making findings.” *Id.* (quotation omitted). To satisfy this requirement,  
17 the ALJ “must set forth his own interpretations and explain why they, rather than the doctors’, are  
18 correct.” *Id.* (quotation omitted).

19 In her opinion denying benefits, the ALJ stated:

20 a doctor’s prescription of conservative treatment is found to be a sufficient reason  
21 for rejecting that opinion. In this case, relevant to the later period, conservative  
22 treatment including only low-doses of medication was all that was offered the  
23 claimant. If still in need of so many additional surgeries, as alleged by the  
24 claimant in hearing testimony, the record fails to documents those plans for  
25 pending neurosurgery. The claimant does not see a psychiatrist, has never seen a  
26 psychiatrist, and apparently no physician feels it is important for him to be under  
27 active medical management by a psychiatrist. Importantly, there are no urgent  
28 MRI or radiograph findings that show serious abnormality to support the  
subjective allegations.

ECF No. 11-1 at 35. The ALJ also noted that other tests showed Vella scored 29/30 on mini-  
mental status performance and was able to orally compute “14 consecutive serial 7’s without

1 making even one error.” *Id.* The objective medical evidence showed no brain injury or disorder  
2 because his EEG and brain MRI were normal. *Id.* Finally, the ALJ commented that although Dr.  
3 Ross’s notes indicate Vella had problems with temper and hostility, Dr. Ross stated Vella was  
4 “able to control these symptoms independently” and there was no other evidence of temper and  
5 hostility, such as criminal violations. *Id.* at 37.

6 The ALJ did not err by failing to give controlling weight to Dr. Ross’s opinions regarding  
7 the severity of Vella’s mental health problems because those opinions were inconsistent with  
8 other substantial evidence in the record, namely Dr. Perlotta’s assessment and Dr. Mashhood’s  
9 opinions, as well as a lack of objective medical support for any brain injury or disorder.  
10 However, the ALJ did not give specific and legitimate reasons supported by substantial evidence  
11 for rejecting Dr. Ross’s opinions in light of the various factors the ALJ must consider to  
12 determine the weight to give that opinion. The ALJ’s statement that Vella did not see Dr. Ross  
13 for a six-month period preceding his application for benefits was not supported by substantial  
14 evidence. As Magistrate Judge Foley stated, this was factually incorrect. Dr. Ross saw Vella  
15 multiple times from September 2011 to January 2012. ECF No. 11-2 at 504-14. The ALJ’s  
16 consideration of the weight to give Dr. Ross’s opinion based on factors such as length of the  
17 treatment relationship, the frequency of examination, or nature and extent of the treatment  
18 relationship between Vella and Dr. Ross was tainted by this factual inaccuracy. It also appears to  
19 have had a significant impact on the ALJ’s credibility assessment. See ECF No. 11-1 at 27 (“On  
20 February 13, 2012, the claimant returned to Dr. Ross for the first time since September 30, 2011,  
21 and discussed his overall (*reportedly*) ‘continuous’ symptoms PTSD and memory disturbances.”  
22 (emphasis in original)).

23 Additionally, the ALJ “did not explain why the lack of psychiatric examination or  
24 treatment was significant, given that Plaintiff was under the continuing and regular care of a  
25 licensed psychologist from September 2011 through June 2014.” ECF No. 19 at 32. Both Dr.  
26 Mashhood and Dr. Ross recommended Vella see a psychiatrist. See ECF No. 11-2 at 254, 267,  
27 494-95, 503, 508-09, 511. Dr. Mashhood thought a psychiatrist would not find any mental  
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1 disorder. ECF No. 11-2 at 267 (stating that he “suspect[s] that the psychiatric evaluation should  
2 be negative for any residual cognitive deficit and/or posttraumatic stress disorder”). But Dr. Ross  
3 repeatedly recommended Vella see a psychiatrist for prescription medication to manage the  
4 “ongoing severe symptoms he is experiencing.” ECF No. 11-2 at 494; *see also id.* at 495, 503,  
5 508-09, 511.<sup>1</sup> The ALJ does not explain why bi-weekly psychological treatment is so  
6 conservative a treatment plan that it undermines Dr. Ross’s opinion on the severity of Vella’s  
7 condition, particularly where Dr. Ross recommended treatment by a psychiatrist to combine  
8 medication with the psychotherapy she was providing.

9 As Judge Foley noted, these errors were not harmless. *Id.* at 33. But there is serious  
10 doubt in the record about whether Vella is in fact disabled. *Id.* at 34. Thus a remand is  
11 appropriate. The parties agree that on remand, the ALJ may review the entirety of Vella’s claim.  
12 *See* ECF Nos. 20 at 5; 21 at 3.

13 IT IS THEREFORE ORDERED that the Report and Recommendation (**ECF No. 19**) is  
14 accepted.

15 IT IS FURTHER ORDERED that plaintiff John Vella’s motion to remand (**ECF No. 12**)  
16 is GRANTED.

17 IT IS FURTHER ORDERED that defendant Carolyn W. Colvin’s motion to affirm (**ECF**  
18 **No. 17**) is DENIED.

19 IT IS FURTHER ORDERED that this case is REMANDED to the Social Security  
20 Administration.

21 DATED this 6<sup>th</sup> day of October, 2016.

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23 ANDREW P. GORDON  
24 UNITED STATES DISTRICT JUDGE  
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<sup>1</sup> Vella apparently never saw a psychiatrist, and the ALJ is free to consider that fact on remand.